

November 12, 1992  
REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

ORDINANCE PROTECTING VICTIMS OF DOMESTIC VIOLENCE

By memorandum dated August 20, 1992, the Mayor requested the City Attorney to prepare a draft ordinance to protect victims of domestic violence which would authorize the following:

- . Direct the police to search and take possession of any weapons or firearms located on the premises where domestic violence has occurred.
- . Revoke or suspend any firearm permits from anyone under a restraining order in connection with a domestic violence offense.

For the reasons stated herein we recommend against enacting such an ordinance.

SUMMARY

1. Penal Code section 12028.5 provides that peace officers at the scene of a domestic violence incident involving a threat to human life or a physical assault, may take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present.

2. Penal Code section 12028.5 also contains detailed and specific provisions that must be followed when a firearm or deadly weapon is taken into custody at the scene of a domestic violence incident.

3. The requested draft ordinance, if enacted, would be preempted by state law.

4. Firearm permits are not issued by the City. However, the San Diego Police Department Domestic Violence Unit does request the issuing authority to suspend or revoke permits when appropriate.

5. The requested draft ordinance, if enacted, would create a public duty on the part of city police officers requiring them to take possession of firearms or deadly weapons at the scene of a domestic violence incident. Penal Code section 12028.5(b) is discretionary, not mandatory, and provides that peace officers "may take temporary custody." Potential civil liability may

result from local legislation creating a public duty not presently in existence.

#### PREEMPTION DISCUSSION

It is well settled that a municipal ordinance is invalid if it attempts to impose additional requirements in a field that is preempted by the general law. Any local legislation in conflict with the general law is void. Conflicts exist if the ordinance duplicates or contradicts a general law. *Lancaster v. Municipal Court*, 6 Cal. 3d 805 (1972).

The California Supreme Court has enumerated three tests for determining whether a local ordinance is preempted by legislative implication:

- (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

*Galvan v. Superior Court*, 70 Cal. 2d 851, 859-860, citing *In re Hubbard*, 62 Cal. 2d 119, 128 (1964).

The fact that the State has legislated on the same subject does not necessarily invalidate a City ordinance. The municipality may make additional regulations, different from those established by the State and not inconsistent with the purpose of the general law. It is only where the legislature has manifested an intention, expressly or by implication, wholly to occupy the field, so that any local regulations will necessarily be inconsistent with state law, that municipal power is lost. *In re Hubbard* at 126.

Penal Code section 12028.5 lists detailed and specific procedural steps required when a peace officer takes temporary custody of a firearm or other deadly weapon at the scene of a domestic violence incident. It requires the weapon to be held at least forty-eight (48) hours and not more than seventy-two (72)

hours after initial seizure. When there is reasonable cause to believe return of the weapon will be likely to result in endangering the victim, the law enforcement agency is required to give the owner notice and within ten (10) days of the seizure initiate a petition in superior court to determine if the weapon should be returned.

Penal Code section 12028.5 details in comprehensive, substantive and procedural terms the authority of a peace officer to take temporary custody of firearms at the scene of domestic violence. This provision is augmented by Penal Code section 12021(g), which makes it a public offense for a person to purchase, receive or attempt to purchase or receive a firearm knowing that he or she is subject to a restraining order. The draft ordinance would most likely fail the first test of Galvan because general state law furnishes complete and comprehensive coverage of steps to be taken when a seizure of firearms occurs following a domestic violence incident. An analysis of the other three (3) tests is not required.

#### CREATION OF STATUTORY DUTY

Penal Code section 12028.5 grants a peace officer discretion to take temporary custody of a firearm at the scene of a domestic violence incident. The proposed ordinance would create a statutory duty requiring peace officers at a domestic violence scene to seize weapons. Currently, no such duty exists. *Baker v. City of Los Angeles*, 188 Cal. App. 3d 903 (1987).

The imposition of a statutory duty on peace officers to seize any firearm or deadly weapon at the scene of a domestic violence incident may result in inestimable civil liability for a breach of that duty.

#### REVOCATION OR SUSPENSION OF PERMITS

The sheriff of a county or the chief of a municipal police department may issue a license to carry concealed a pistol, revolver, or other firearm for a period not to exceed one year. Penal Code Section 12050. The San Diego Chief of Police does not issue concealed weapons licenses under Penal Code section 12050. The Sheriff of San Diego County does issue such licenses.

An individual licensed to carry a concealed firearm pursuant to Penal Code section 12050, has no property right to the license. The sheriff may revoke the license without conducting an evidentiary hearing. *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236 (1990, 2d Dist.).

Penal Code section 12021(g) makes it a misdemeanor for a person subject to a restraining order to purchase, receive, or attempt to purchase or receive a firearm.

The firearms license or permit of a person subject to a

restraining order cannot be effectively revoked or suspended based on a city ordinance when the chief of police of the city is not the issuing authority. The chief of police can be required to seize the firearms license or permit of any person subject to a restraining order for a domestic violence offense and seek revocation of the license or permit by the issuing authority. A provision to accomplish the purpose is included in the draft ordinance.

#### CONCLUSION

The attached ordinance was prepared in response to the Mayor's request. Section 52.2001 requires any peace officer to take temporary custody of firearms and other dangerous weapons at the scene of a domestic violence incident. Potential civil liability will result from the creation of this statutory duty to seize weapons.

Section 52.2002 requires a police officer to seek the victim's consent to search for firearms in premises under her dominion and control.

Section 52.2003 requires police officers to seize the firearms license or permit issued to any person subject to a restraining order for a domestic violence offense and to take other appropriate action leading to revocation of that license by the issuing authority.

Sections 52.2001 and 52.2002, of the attached ordinance are considered preempted by state law. The City may seek state legislation concerning the revocation or suspension of firearm permits from anyone under a restraining order in connection with a domestic violence offense.

We recommend against enactment of the ordinance. If enacted, this office will approve the ordinance for form only.

Respectfully submitted,  
JOHN W. WITT  
City Attorney

JMB:jp:513(043.1)

Attachment

RC-92-66

TOP

TOP